Not Reported in Cal.Rptr.3d, 2005 WL 1793725 (Cal.App. 1 Dist.)
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(Cal. Rules of Court, Rules 976, 977)
Briefs and Other Related Documents

Court of Appeal, First District, Division 3, California.
Henry FERRE, Plaintiff and Respondent,
v.
Daniel FERRE, Defendant and Appellant.
No. A104714.
(Contra Costa County Super. Ct. No. C0300325).
July 29, 2005.

Joseph Michael Morrill, Barr & Barr, Pleasant Hill, CA, Mark V. Isola, Rehon & Roberts, San Jose, CA, for plaintiff-respondent.
Scott K. Zimmerman, Law Office of Scott K. Zimmerman, Brentwood, CA, for defendant-appellant.

PARRILLI, J.
*1 Henry Ferre sued his son, Daniel Ferre, for financial elder abuse and fraud. Henry alleged that Daniel had forged deeds and then filed a partition action resulting in a forced sale of real property originally held by Henry's trust. Henry claimed Daniel had wrongfully gained about $500,000 in these transactions. A jury found for Henry, awarding him $500,000 in compensatory damages, $100,000 in non-economic damages, and $325,000 in punitive damages.
On appeal, Daniel contends: (1) the court erroneously denied him leave to amend his answer; (2) the court improperly denied his motion to exclude evidence of a fax to an estate planning attorney, in which Daniel proposed a $50,000 bequest to the bookkeeper who notarized the deeds at issue in the case; (3) the court abused its discretion by refusing to permit Daniel to call a handwriting expert to rebut Henry's expert; and (4) the award of punitive damages was unsupported by any evidence of Daniel's financial condition.
We affirm the judgment. We will discuss the relevant facts in connection with Daniel's contentions.

DISCUSSION

1. *Denial of Leave to Amend*

Henry obtained a preferential trial setting due to his age and health. Two weeks before the date scheduled for trial, Daniel moved for leave to amend his answer to include the affirmative defense of set-off. The court heard the motion on the first day of trial, and denied it as untimely. Daniel contends this was prejudicial error. We disagree.
Although amendments to pleadings are liberally allowed up to and including the time of trial, this policy does not apply when there is inexcusable delay and probable prejudice to the opposing party. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487, 55 Cal.Rptr.2d 225; see also *Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1428-1429; , 73 Cal.Rptr.2d 227 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 1126, 1133.) Daniel offered no excuse for his belated motion, other than that the complaint had been filed only six months earlier and the answer only two months earlier. Henry claims he was prejudiced by evidence supporting the set-off claim that Daniel discovered only the week before trial, and failed to disclose to Henry.
Even if were we to conclude the trial court abused its discretion by denying leave to amend, Daniel could show no prejudice. As Henry points out, Daniel sought to set off against Henry's personal claims an amount Daniel asserted was owed to him by a partnership between Henry, Daniel, and Daniel's brother Tom Ferre. However, " 'a partnership obligation or claim may not be set off against the personal obligation or claim of [one of] the partners.' " (*Carnation Co. v. Olivet Egg Ranch* (1986) 189 Cal.App.3d 809, 820, 229 Cal.Rptr. 261.) Thus, any error on this point was not reversible.

2. *Evidence of a Gift to the Notary*

Loretta Dee was a bookkeeper for the Ferres' partnership, who notarized the deeds in question. Henry testified he did not sign Dee's notary book; Dee testified that he did sign the book. During cross-examination by Henry's counsel, Daniel conceded that he and Dee were very good friends. Counsel asked whether Daniel had "looked into giving her $50,000 at one point." After an objection by his counsel was overruled, Daniel admitted "[i]t was going to be in my estate plan when I died, but I never did it."
*2 Henry's counsel then sought to introduce a fax from Daniel to Derek Knudson, a lawyer with whom Daniel consulted on his estate plan. Daniel's counsel objected on grounds of attorney-client privilege. The jury was excused, and Daniel's counsel told the court the fax in question had been disclosed by mistake. Henry's counsel acknowledged he had received a number of documents from Knudson that he thought were privileged, but said this particular fax had been reviewed at length during Daniel's deposition without any objection being raised. Therefore, counsel argued the privilege had been waived. He also asserted the privilege did not apply, because Henry and Daniel had always been present at each other's estate planning meetings with Knudson.
Daniel's counsel responded that he had indeed asserted the privilege, but at an earlier point in Daniel's deposition. Counsel showed the court the pages of the deposition supporting his claim, which he conceded were 800 pages before the fax was discussed at the deposition. The court inquired, "[t]hat's all you said about the attorney-client privilege?" Counsel confirmed that it was. The court ruled the privilege had been waived, and admitted the document into evidence. Henry's counsel had Daniel read the following passage to the jury: "I, Dan Ferre, gave [*sic*] my very special friend Loretta Dee $50,000 to which she can purchase 100 percent interest of Alamo Flowers or retain the $50,000."

Daniel contends the court erred by allowing the fax into evidence .[FN1] Henry responds by noting the deposition pages that Daniel relies on to establish his assertion of the privilege are not part of the record on appeal. Without this evidence, we must presume the trial court's ruling was correct. It is certainly conceivable that the deposition transcript failed to show a sufficient objection to the fax on grounds of attorney-client privilege. Accordingly, Daniel has failed to sustain his burden of demonstrating error. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416, 122 Cal.Rptr.2d 167.)

FN1. Daniel also claims the court erred by denying an in limine motion to exclude evidence of a romantic relationship between him and Dee. However, the fax is the only evidence he challenges, and the only legal ground on which he relies is attorney-client privilege.

3. *Impeachment of Henry's Handwriting Expert*

Daniel sought to call an undisclosed handwriting expert to testify that when Henry's handwriting expert isolated Henry's signature from the notary's book, using Adobe Photoshop, she had confused an image from a different line in the book for the "H" in the signature. The request was made and denied in chambers. In placing the ruling on the record, the court described its determination as follows: "··· I disallowed that testimony because it was an undisclosed expert and it was my ruling that that was an opinion of the plaintiff's expert that this was the signature after she had performed her expert analysis of the notary book and whatever else she did to come up with the Adobe photo shop image of the signature from the notary book and that represented an opinion of hers as to what the signature was. [¶] So it wasn't a fact and I disallowed the testimony."

*3 Daniel contends this ruling was erroneous. Code of Civil Procedure section 2034, subdivision (m) permits a party to call an undisclosed expert if "that expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion."

As explained in *Mizel v. City of Santa Monica* (2001) 93 Cal.App.4th 1059, 1067-1068, 113 Cal.Rptr.2d 649: " 'Under Code of Civil Procedure section 2034, subdivision (m), an undisclosed expert witness called for impeachment purposes is permitted to testify that a foundational fact relied upon by a prior expert is either incorrect or nonexistent. [Citation.]' (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 53, 83 Cal.Rptr.2d 590[ ].) 'This can be done either by cross-examination of the expert or by calling other witnesses to offer evidence showing the nonexistence or error in the data upon which the first expert based his opinion. [Citations.]' (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923, 184 Cal.Rptr. 393[ ].) Thus, a nondesignated expert may testify as to the facts underlying the expert's opinion. (*Id.* at pp. 923-924, 184 Cal.Rptr. 393.) 'However, under section 2034, subdivision (m), " 'calling an expert witness to express an opinion contrary to that expressed by another expert witness is not the "impeachment" contemplated by section [2034, subdivision (m)].' " [Citation.]' (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co., supra,* at pp. 53-54, 83 Cal.Rptr.2d 590.) [Footnote omitted.] Although

the distinction between a ‘fact’ and ‘opinion’ may be thin, it has to be made. In doing so, trial courts are to strictly construe the term ‘foundational fact’ so as to ‘prevent a party from offering a contrary opinion of his expert under the guise of impeachment.’ (*Kennemur v. State of California, supra,* at p. 924, 184 Cal.Rptr. 393.)”

Although the distinction between fact and opinion may indeed be a fine one, we agree with Daniel that in this case the trial court erred. Henry did not call his expert to offer an opinion on whether the writing in the notary book or in her Photoshop image was a signature; he offered her opinion to show the signature was forged. Daniel could not call an expert to contradict that opinion. He should, however, have been permitted to call an expert to challenge the factual basis for the opinion. If Henry's expert relied on a faulty image in reaching her conclusion, that would have been the kind of foundational fact that is open to impeachment under Code of Civil Procedure section 2034, subdivision (m). (See *Kennemur v. State of California, supra,* 133 Cal.App.3d at pp. 924-925, 184 Cal.Rptr. 393 [expert testimony that photograph of tire tracks was inaccurate would have been proper impeachment].)

Nevertheless, the error was clearly harmless. The expert did not base her opinion merely on the form of the “H” in one signature. The authenticity of three signatures was at issue, and the expert used multiple points of comparison between the questioned signatures, over 10 authentic examples of Henry's signature, and 6 known examples of Daniel signing Henry's name. In the notary book, there were two authentic signatures and two questioned signatures. The expert noted the difficulty of separating the signatures from writing on other lines, but observed that the authentic signatures were not intertwined with the writing on other lines of the notary book to the same extent as the questioned signatures. She also found that the proportions varied between the authentic and questioned signatures, distinguished the “Y-F configuration[s],” and pointed out that the ending strokes of the questioned and authentic signatures were different.

*4 Given the wealth of detail in the samples available to the expert and the multiple grounds supporting her opinion, we are satisfied Daniel would not have achieved a better result at trial had his expert been permitted to question the foundation for the expert's opinion as to one of the “H's” in the Photoshop presentation.

4. *Evidence of Daniel's Financial Condition*

Daniel claims the $325,000 punitive damage award must be reversed, because Henry failed to present evidence of his financial condition. Henry notes the jury heard evidence that Daniel had earned $1 million from the sale of a trucking company he had operated with Henry, obtained $500,000 from the fraudulent transactions described at trial, and invested $560,048 in the almond ranch the Ferres operated on their property, including regular $4,000 monthly contributions from 1999 onward. Daniel replies that there was no evidence of his net worth or liabilities at the time of trial.

Our Supreme Court has refrained from requiring evidence of net worth as the measure of a defendant's ability to pay punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 116, fn. 7, 284 Cal.Rptr. 318, 813 P.2d 1348.) As Daniel notes, the *Adams* court was particularly concerned with ensuring that evidence of financial condition is in the record to enable a reviewing court to determine whether the award of punitive damages was excessive. (*Id.* at pp. 110-112, 284 Cal.Rptr. 318, 813 P.2d 1348.) In *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 16 Cal.Rptr.2d 811, the only post- *Adams* case cited by

Daniel, the court was also concerned with its ability to say whether the award was excessive. (*Id.* at p. 1064, 16 Cal.Rptr.2d 811.)
We need not address that issue, however, because Daniel does not claim the punitive damages awarded against him were excessive. In his reply brief, he suggests the award must have been the product of passion and prejudice on the part of the jury. It is settled, however, that an appellant may not raise this issue on appeal without first bringing it before the trial court on a motion for new trial. "The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by 'passion or prejudice.' [Citation.] In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.] When defendants first challenge the damage award on appeal, without a motion for a new trial, they unnecessarily burden the appellate courts with issues which can and should be resolved at the trial level." (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919, 114 Cal.Rptr. 622, 523 P.2d 662.)
Daniel did not move for a new trial. We conclude that, absent any claim the damages were excessive, the evidence of Daniel's financial condition was sufficient to support the jury's award of punitive damages.

DISPOSITION

The judgment is affirmed. Henry shall recover his costs on appeal.

We concur: McGUINESS, P.J., and POLLAK, J.

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